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IN THE

# Supreme Court of the United States

**October Term, 1994**

IN THE MATTER

OF

RONALD R. BENJAMIN an Attorney and Counselor-at-Law

RONALD R. BENJAMIN,

*Petitioner,*

*against*

COMMITTEE ON PROFESSIONAL STANDARDS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

## RESPONDENT'S BRIEF IN OPPOSITION

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## Questions Presented

Whether the public censure of an attorney based upon a finding that the attorney attempted to mislead a court, where the findings of fact are supported by the evidence, violates the attorney's First Amendment rights and impermissibly limits his ability to vigorously advocate his client's position in a case?

Whether the public censure of an attorney has an impermissible chilling effect and deprives the attorney of his right to petition the government for redress of grievances, when the disciplinary process was initiated by a judge after that judge granted the attorney's motion the judge recuse himself from a case in which the attorney appeared, when the attorney has failed to set forth any proof that the judge who initiated the disciplinary process did so as a retaliatory act?

## Parties to the Proceeding

The parties to the proceeding below were Petitioner Ronald R. Benjamin (captioned Appellant below), and Respondent Committee on Professional Standards of the State of New York Supreme Court, Appellate Division, Third Judicial Department (captioned Respondent below).

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[1] Throughout his Petition, petitioner appears to have erroneously cited this case as 129 AD2d 886; the citation for a 1987 New York State Supreme Court, Appellate Division, Third Judicial Department, disciplinary decision where after a finding of attorney misconduct petitioner was suspended from the practice of law in New York State for six months.

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No. 94-1568

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# RESPONDENT'S BRIEF IN OPPOSITION

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## Statutes Involved

In addition to those constitutional and statutory provisions cited by the petitioner, respondent submits the following to this Court:

*Rules of the Supreme Court, Appellate Division, Third Judicial Department, Part 806. Conduct of Attorneys of Title 22 of New York Codes, Rules and Regulations [NYCRR]: 22 NYCRR §806.4*

*806.4 Procedure*

*(a) Investigation generally.* Investigation of professional misconduct may be commenced by the committee, through the chief attorney, upon receipt of a specific complaint or by the committee on its own motion. Complaints must be in writing and signed by the complainant, but need not be verified. Prior to initiating an investigation on its own motion, the committee shall file as part of its record a written inquiry signed by the chief attorney, which inquiry shall serve as the basis for such investigation.

*(b) Investigation by Chief Attorney.* Before initiating an investigation of a specific complaint against an attorney, the chief attorney shall determine whether the allegations, if true, are sufficient to establish a charge of professional misconduct. If deemed sufficient, the chief attorney shall forward a copy of the complaint to the attorney, together with a statement of the nature of the alleged professional misconduct and a request that the attorney furnish a written statement concerning the complaint, and shall advise the attorney that a copy of his statement may, in the discretion of the committee, be furnished to the complainant for reply. Attorneys shall be expected to cooperate with all investigations. As part of an investigation, the chief attorney may request an attorney to appear pursuant to written notice to be examined under oath by the chief attorney or a staff attorney, and may, when necessary, apply pursuant to subdivision (e) of this section for a subpoena directing the attorney to appear for such examination. Stenographic minutes of such exami-

nation shall be made and a transcript made available to the attorney upon his request and payment of the stenographic fees. If an attorney requests that an examination be conducted before a third person, the chairman of the committee shall designate a member of the committee as the person before whom the examination shall be held. Upon the conclusion of an investigation, the chief attorney shall make a report to the committee. An attorney who fails to comply with a subpoena directing him to appear for examination may, in the court's discretion, be suspended pending his compliance or until further order of the court.

*(c) Action by Committee.*

(1) If, after an investigation, the committee determines that no further action is warranted, the complaint shall be dismissed and the complainant and the attorney shall be so notified in writing; or, if the investigation was undertaken on the committee's own motion, the investigation shall be discontinued. If, after an investigation, the committee determines that a complaint warrants action, it may:

(i) direct that a disciplinary proceeding be commenced against the attorney; or

(ii) admonish the attorney, either orally or in writing, or both, if the acts of misconduct have been established by clear and convincing evidence and the committee determines in its discretion in light of all of the circumstances that the misconduct is not serious enough to warrant prosecution of a disciplinary proceeding; or

(iii) issue a letter of caution, if the acts of misconduct have been so established and the committee determines in its discretion in light of all the circumstances that the misconduct is not serious enough to warrant either prosecution of a disciplinary proceeding or imposition of an admonition; or

(iv) issue a letter of education, if the committee determines, in its discretion, that the actions of the attorney warrant comment.

(2) Prior to imposition of an admonition, the committee shall give the attorney 20 days' notice by mail of the committee's proposed action. If the attorney desires to challenge the committee's action, the attorney may demand that the committee institute a disciplinary proceeding. Such demand shall be made by letter, certified mail, return receipt requested, within 10 days from the date of mailing the notice of the committee's proposed action. In the event that the attorney makes no such demand, the committee may proceed with the admonition. In any disciplinary proceeding instituted pursuant to this paragraph, the court shall not be bound by the committee's determination to admonish the attorney but may impose such discipline as it determines to be warranted by the facts.

(3) No prior notice to the attorney is necessary for the issuance of a letter of caution. The attorney may, however, request reconsideration of the committee's action in issuing a letter of caution. Such request shall be made by letter, certified mail, return receipt requested, within 10 days from the date of the mailing of the committee's letter. The request shall be considered by a subcommittee consisting of the chairman and two other committee members designated by the chairman. If it is determined by a majority of the subcommittee that reconsideration is warranted, the matter shall be resubmitted to the committee. Upon reconsideration, the committee shall not be bound by its prior determination but may take such action, including imposition of a more severe sanction or institution of a disciplinary proceeding, as the committee may determine.

(4) When an attorney has been admonished or cautioned, the committee shall promptly notify the complainant of the action taken. The committee's records relating to its investigation and sanction shall be confidential. An admonition or letter of caution may be considered by the court and the committee in determining whether to impose

discipline and the extent of discipline to be imposed in the event other charges of misconduct are brought against the attorney.

## Statement of the Case

Petitioner is an attorney who was publicly censured by the New York State Supreme Court, Appellate Division, Third Judicial Department[2], for attempting to mislead a trial court "by asserting a specious res judicata or a collateral estoppel defense on behalf of a client in the context of a divorce proceeding (specification 1) and by inaccurately asserting in a sworn affidavit that he had failed to timely serve an amended complaint in a wrongful death action because the parties had agreed among themselves to discontinue discovery so that the amended complaint, when served, would not require additional amendments (specification 2). The affidavit was made in support of a motion to file a late amended complaint. Respondent later admitted that there was no express agreement among the parties to continue discovery." *Matter of Benjamin*, 205 AD2d 978 (3rd Dept. 1994) (Pet.App. at 5a-8a)[3].

This disciplinary proceeding arose in part from an action entitled *Hall v. Hall,* brought before New York State Supreme Court Justice Robert E. Fischer by order to show cause, dated February 9, 1989, returnable on February 18, 1989. Linda Hall sought exclusive occupancy of the parties' marital residence. Petitioner represented James Hall, the responding party in the matrimonial proceeding. On the February 18, 1989 return date, during a hearing before Justice Fischer, *petitioner asserted that the occupancy issue before Supreme*

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[2] Hereinafter, the New York State Supreme Court, Appellate Division, Third Judicial Department, will be referred to as the Appellate Division, Third Judicial Department.

[3] Petitioner's Appendix will be cited in this brief as "Pet. App."

*Court had been fully resolved in Family Court and that Family Court's determinations had* res judicata *effect on the instant proceeding*. Justice Fischer directed petitioner to produce the Family Court papers to support his *res judicata* assertion.

By letter dated February 21, 1989, petitioner provided Justice Fischer with Mr. Hall's affidavit in opposition to the order to show cause, dated February 17, 1989, which was drafted by petitioner. In paragraph number 5, Mr. Hall asserted "that the allegations and issues raised herein are identical to the ones adjudged by Judge Esworthy and that his Decision is res judicata." In paragraph number 16, Mr. Hall asserted "I, therefore, submit that in addition to this matter being res judicata that I simply never engaged in any conduct physically hitting or otherwise causing my wife any fear..."

At the March 9, 1989 hearing, petitioner conceded that he had not supplied Justice Fischer with the requested documentation by the March 1, 1989 deadline. During the hearing, petitioner produced documentation in an attempt to support his contention that Mrs. Hall's allegations of physical abuse had been adjudicated in Family Court and determined not to have occurred. This documentation was comprised of Family Court Judge Joseph Esworthy's November 7 and 10, 1988 orders of protection against Mr. Hall. The November 7, 1988 order directed Mr. Hall not to harass Mrs. Hall and to remain away from the marital residence. The November 10, 1988 order directed Mr. Hall not to harass Mrs. Hall, without any mention of remaining away from the marital residence.

At the March 9, 1989 hearing, Justice Fischer questioned petitioner on his assertion that Family Court proceeding had *res judicata* effect on Supreme Court, as none of the documents produced addressed or resulted in determinations of exclusive occupancy or ownership of the marital residence. Petitioner asserted that he had misspoken and he merely meant to convey that Mrs. Hall was collaterally estopped from re-litigating the issue of physical abuse.

The second matter addressed in the disciplinary proceeding began on November 3, 1989, when a wrongful death action entitled *Debiaw v. Ruffo, et. al.*, was commenced before Justice Fischer. Petitioner represented Deborah Debiaw, the widow and executrix of Allan G. Debiaw, a truck driver who died after being removed from his tractor-trailer following an accident. Initially, the action was brought against Broome County Sheriff Anthony C. Ruffo alleging that a policy of favoritism in the selection of tow truck operators delayed Mr. Debiaw's rescue. Petitioner moved to amend the complaint in or about April, 1990, to add eight additional defendants and expand his claim from two to twenty causes of action. Justice Fischer granted petitioner's motion to amend the complaint to add eight defendants, reserving decision on the remaining issues pending a hearing. A hearing was held on July 6, 1990 to address the additional claims, allowing defense counsels an opportunity to be heard. By decision dated December 3, 1990, petitioner was allowed to add the additional defendants and causes of actions, and was ordered to serve the "Amended Complaint, in form and amended in conformance with this Order, upon counsel for the respective defendants within twenty (20) days after the service of a copy of this Order duly entered."

Rather than serve the amended complaint in accordance with the Court's order, petitioner provided opposing counsels with a draft of an amended complaint he termed a "proposed second Amended Complaint" by letter dated December 14, 1990. Between January and March, 1991, petitioner made discovery requests and conducted depositions of two employees of the Broome County Department of Emergency Services. Although petitioner supplied opposing counsels with copies of several proposed amended complaints, he failed to comply with the December 3, 1990 order directing him to serve the amended complaint, amended in conformance with the order, upon defendants' counsels within twenty days after the service of the Order.

On March 22, 1991, petitioner moved to further amend the complaint. After receiving defense counsels' cross-motions, oral argument was held on the various motions on May 10, 1991.

Petitioner responded to defense counsels' arguments in a sworn affidavit, dated May 17, 1991, wherein he asserted in paragraph 29 "*your deponent respectfully submits that the reason the Amended Complaint was not timely filed was that the parties had agreed among themselves to continue the discovery to develop additional facts so that when the Amended Complaint was served it would not need future amendments.*" (Emphasis Added)

At a June 7, 1991 appearance, petitioner admitted that his statement contained in the May 17, 1991 sworn affidavit was not true. Petitioner stated "*I agree that there was no formal agreement with anyone about that is what we were doing.*" At the same appearance he later admitted "*There was no express agreement between counsel to not timely serve the amended complaint, which should have been served about December 26 or so.*" (Emphasis Added)

By letter dated July 1, 1992, Justice Fischer filed a written inquiry with respondent alleging petitioner had committed attorney misconduct, specifically asserting that in four matters pending before Justice Fischer, petitioner had made untrue assertions. 22 NYCRR §806.4(a) Following respondent's investigation of Justice Fischer's allegations, respondent determined that petitioner's conduct violated New York's Disciplinary Rule 1-102(A)(4), prohibiting a lawyer from "[e]ngag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation" and pursuant to the provisions of 22 NYCRR § 806.4 he should receive a letter of admonition. By letter dated May 10, 1993, petitioner was advised of respondent's intention to issue a letter of admonition, unless within ten days he rejected the proposed discipline and demanded the institution of a disciplinary proceeding pursuant to 22 NYCRR § 806.4 (c)(2) By letter dated May 20, 1993, petitioner requested an opportunity to appear before respondent's Executive Committee to request reconsideration of the proposed letter

of admonition. Following petitioner's May 27, 1993 appearance before respondent's Executive Committee, by letter dated June 7, 1993, petitioner was advised of respondent's intention to issue the letter of admonition unless within 10 days from the date of that letter, petitioner demanded the institution of a disciplinary proceeding. By letter dated June 14, 1993, petitioner demanded that respondent institute a disciplinary proceeding as he would not accept the letter of admonition.

A petition of charges containing one charge and three specifications, verified July 6, 1993, was served upon petitioner. An answer was served by petitioner, verified July 27, 1993. An amended answer was served by petitioner, verified September 30, 1993. By order of the Appellate Division, Third Judicial Department, dated September 16, 1993, respondent's motion for referral to a fact finding referee was granted. Issues raised by petitioner's answer were referred to the Honorable Liston F. Coon, retired Schuyler County Court Judge, to take testimony and report his findings thereon to the Appellate Division, Third Judicial Department. The hearing was commenced before Judge Coon on October 19, 1993, continued on November 16, 1993, and concluded on December 2, 1993. Various witnesses, including Justice Fischer, testified during the hearing.

During the disciplinary proceeding before Judge Coon, petitioner testified, relative to the *Hall* matter, that he did not specifically recall what occurred or what he said at the February 18, 1989 appearance. "...I think we may have went there and a hearing was scheduled. I don't recall that there was any testimony taken. Affidavits were submitted and the Judge said he scheduled it. But that, you know, I can't remember that stuff."[4] During the disciplinary proceeding Mr. Hall testified that petitioner had represented him in 1988 and 1989 in

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[4] In his Petition, petitioner fails to make any reference to his February 18, 1989 appearance. He incorrectly asserts that the first appearance on the order to show cause was March 9, 1989.

matters before Family Court and Supreme Court. Mr. Hall testified that the above-mentioned affidavit in opposition to the order to show cause was prepared by petitioner after he had spoken with Mr. Hall. When asked whether he had advised petitioner that the Family Court decision had *res judicata* effect on Supreme Court, he testified that he did not know what the words *res judicata* meant.

Relative to the *Debiaw* matter, although petitioner's expert witness testified that it was common practice to engage in informal discovery in Broome County, New York, where petitioner practices, he conceded that discovery, such as the depositions held in this matter should have been conducted on notice to all parties. Petitioner failed to put all parties on notice of the ongoing discovery. Some defense counsels were not given an opportunity to agree to foregoing service of an amended complaint in lieu of informal discovery.

In his April 6, 1994 Referee's report Judge Coon found that petitioner had engaged in a course of conduct "intended to mislead, misguide, misinform, deceive, circumvent and confuse court and counsel. The totality of the circumstances here manifest and make evident the violation of the type of misconduct contemplated by D[isciplinary] R[ule] 1-102 (A)(4)." (Pet.App. at 9a-15a). Respondent moved to confirm the Referee's report by motion dated April 19, 1994. By motion dated May 26, 1994, petitioner moved to deny confirmation of the referee's report and to dismiss the petition of charges. By memorandum and order of the Appellate Division, Third Judicial Department, dated June 24, 1994, the Court found that petitioner had engaged in misleading conduct as set forth in Specifications 1 and 2 of the petition of charges' sole charge. The Court rejected the third specification. (Pet.App. at 5a-8a). Petitioner's appeal to the New York Court of Appeals was dismissed on September 22, 1994 on the ground it did not raise a substantial constitutional issue. (Pet.App. at 3a-4a). A motion to the New York Court of Appeals seeking discretionary review was denied on December 22, 1994. (Pet.App. at 1a-2a).

## Summary of the Argument

A finding that petitioner had engaged in misleading conduct toward a court by making a verbal and a written sworn statement without any reasonable basis to believe the statements were true and possessing first hand knowledge that the statements were not true following a fact finding hearing, which resulted in the imposition of a public censure, did not violate petitioner's First Amendment rights or hinder his ability to zealously represent clients.

The disciplinary proceeding commenced against petitioner, resulting from an inquiry filed by a judge whom petitioner had attempted to mislead by making untrue assertions, was not an improperly brought, retaliatory act, because the filing of the inquiry was justified by petitioner's conduct. Petitioner has failed to set forth any proof that the judge acted in a retaliatory manner or that his First Amendment rights were violated.

## REASONS FOR DENYING THE WRIT

### I.

### The imposition of a public censure based on a finding that an attorney attempted to mislead a court, where supported by the evidence, does not violate the attorney's First Amendment rights.

#### A. The New York Supreme Court, Appellate Division, Third Judicial Department's Finding of Misconduct and Imposition of Discipline Was Warranted by the Facts.

Petitioner's first question presented asserts that there was insufficient proof for the findings made and the conclusions drawn. Specifically, petitioner asserts that there was insufficient proof for Judge Liston Coon, the fact finding referee, and the Appellate

Division, Third Judicial Department, to find he violated New York's Disciplinary Rule 1-102 (A)(4) which provides that "[a] lawyer shall not:... [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation". The inquirer herein, Supreme Court Justice Robert E. Fischer, testified at length on November 16, 1993, before Judge Coon, detailing petitioner's misleading and deceitful conduct.

Addressing the *Hall* matter, Justice Fischer testified that at the February 18, 1989 hearing before him, commenced by counsel opposing petitioner's client, and brought on by order to show cause seeking exclusive occupancy of a marital residence, petitioner stated that the occupancy issue before Supreme Court had been fully resolved in a prior Family Court proceeding and that Family Court's determination had *res judicata* effect on the instant proceedings.

> Justice Fischer: At the argument, Mr. Benjamin asserted that this matter that had been brought on for determination by me had been fully resolved in the Family Court, in a Family Court hearing, and it was res judicata or this court in which I was sitting was collaterally estopped from considering the issue.

After petitioner failed to timely comply with Justice Fischer's directive that he provide documentary proof of the Family Court determination and its alleged *res judicata* effect, at a March 9, 1989 hearing, Justice Fischer questioned petitioner regarding his assertion, as none of the documentation provided addressed or resulted in determinations as to exclusive occupancy or ownership of the marital residence. The Family Court proceeding had resulted in the issuance of an order of protection against petitioner's client. At the March 9, 1989 hearing, petitioner asserted that he must have misspoken at the earlier appearance. The relevant portion of the March 9, 1989 hearing transcript is reproduced in the Petition, pages 12-14.

In his Petition, petitioner fails to mention his February 18, 1989 appearance before Justice Fischer wherein he made the misleading statement in the *Hall* matter. Other than referencing his previous

attempts to excuse the misleading statement, petitioner fails to provide any new explanation for his baseless assertion. In petitioner's testimony during the proceeding before Judge Coon, he asserted a lack of recollection of what transpired during the February 18, 1989 appearance. He did not deny the statements attributed to him by Justice Fischer and he should be precluded from doing so here.[5]

No reasonable interpretation of the substance and result of the prior Family Court proceeding could justify petitioner's assertion, as testified to by Justice Fischer, that the matter brought before Justice Fischer by order to show cause seeking exclusive occupancy of the marital residence was "fully resolved," "was *res judicata*" and Justice Fischer's court "was collaterally estopped from considering the issue."

Addressing the *Debiaw* matter, Justice Fischer testified that after petitioner filed his May 17, 1991 sworn affidavit asserting that he had failed to comply with Justice Fischer's order to file an amended complaint within twenty days of that order because "the parties had agreed among themselves to continue discovery", petitioner at a June 7, 1991 appearance, admitted the May 17, 1991 affidavit's sworn statement was not true. The relevant portion of the June 7, 1991 hearing transcript is reproduced in the Petition, pages 16-17.

Here, the documentary evidence coupled with Justice Fischer's testimony established that petitioner's sworn statement was untrue and intended to mislead the court.

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[5] When considered along with the statements attributed to petitioner on February 18, 1989, the 1988 Family Court orders referred by petitioner support the Appellate Division, Third Judicial Department's finding of misconduct.

The testimony of the various witnesses adduced during the three days of the fact finding hearing, as well as the documentary evidence introduced, provided Judge Coon with a reasonable basis for his findings of fact (Pet.App. 9a-15a). The Appellate Division, Third Judicial Department, following its own review of the case based upon the entire record, appropriately confirmed two of the three specifications contained in respondent's petition of charges.[6] (Pet.App. 5a-8a)

A court's deference to the fact finders' determination on the issue of credibility is predicated upon the common sense notion that the referee who observes the witnesses and hears the testimony is in a special position to evaluate and integrate that evidence with other facts before him. *Matter of von Wiegen,* 146 AD 2d 901 (3rd Dep't 1989), *lv. denied,* 74 NY2d 603 (1989); *Matter of Berenhaus v. Ward,* 70 NY2d 436, 443 (1987).

In *Matter of Holtzman,* 78 NY2d 184, 190 (1991), *cert. den.*, 502 US 1009 (1991), the New York Court of Appeals held that findings of fact were binding upon the Court of Appeals where the findings were supported by the record below. This Court declined to review that matter.

**B. The New York Supreme Court, Appellate Division, Third Judicial Department's Imposition of a Public Censure Did Not Violate Petitioner's First Amendment Rights.**

Although petitioner was unsuccessful in his requests for appellate review by the New York Court of Appeals, longstanding precedent has established that the power and discretion of the Appellate

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[6] It cannot and is not argued that the Appellate Division, Third Judicial Department, did not afford petitioner a complete review of the record which included disaffirming a portion of the Referee's report as it pertained to specification 3 of the petition of charges.

Division's, in imposing discipline on attorneys is not subject to review by the Court of Appeals. *See, Matter of Goodman,* 199 NY 143 (1910); *In Re Robinson,* 209 NY 354 (1913); *In Re Flannery,* 212 NY 610 (1914).

In *In Re Axtell,* 257 NY 210 (1931), the Court of Appeals reiterated its position that the Appellate Division that pronounces the sentence has jurisdiction exclusive of any other. The Court specifically provided that "the members of the New York State Supreme Court and the Appellate Division of that court has exclusive jurisdiction to say what constitutes professional misconduct on their part, ... moreover the punishment that is to follow must be determined by the Appellate Division and is not subject to revision even in this court". This Court has declined to review such matters. *Erie County Water Auth. v. Western New York Water Co.,* 304 NY 342, 346 (1952), *cert den.* 344 US 892 (1952). The Court of Appeals reaffirmed this principle in subsequent decisions. *Matter of Baker,* 28 NY2d 977 (1971), *cert. den.,* 404 US 915 (1971); *Matter of Kelly,* 23 NY2d 368, 384 (1968).

Contrary to Petitioner's assertion that the New York courts have failed to consider his Constitutional claim, his First Amendment concerns were raised and considered by the Appellate Division, Third Judicial Department. As this Court noted in *Middlesex County Ethics Committee v. Garden State Bar Assoc.,* 457 US 423, 435 (1982), the states are capable of considering federal constitutional challenges. In petitioner's May 26, 1994 motion to deny confirmation of Judge Coon's April 6, 1994 report and dismiss the petition of charges, he raised the substance of his constitutional challenges. The Appellate Division, Third Judicial Department, following a review of the entire record confirmed the referee's report as to two of three specifications. The New York Court of Appeals examined petitioner's constitutional claim upon a review of the record as put forth by petitioner, and dismissed petitioner's appeal "upon the ground that no substantial constitutional question is directly involved." (Pet.App. 3a-4a)

**C. The New York Supreme Court, Appellate Division, Third Judicial Department's Imposition of a Public Censure Was an Appropriate Sanction and Within Its Discretion.**

Petitioner's first question presented and his argument in support thereof, question the appropriateness of the censure imposed by the Appellate Division, Third Judicial Department. It is respectfully noted that the Court below considered both mitigating and aggravating factors as set forth in the decision, before imposing discipline, including petitioner's disciplinary history. The referee's findings individually and collectively support the Appellate Division's sanction of censure and should not be disturbed.

As stated by the New York Court of Appeals in *In re Flannery:*

> It is not for us, where opposing inferences may be drawn, to determine which we shall accept and which reject. It is not for us to revise the measure of punishment which guilt, when adjudged, is to entail. In establishing the standard of conduct to which the bar must at its peril, conform, the Appellate Division has a wide discretion, which we have neither the wish nor the power to interfere... We have no right to say, where any measure of blame attaches to the offense, that the standard has been set too high. 212 NY at 611.

Further, in *Matter of Goodman,* the same Court noted:

> In a proceeding of this character the power to review ends in this court when it appears that the proceeding has been instituted and conducted in accordance with the statutes and rules authorizing it; that no substantial legal right of the accused has been violated; that no prejudicial error has been committed in the reception or exclusion of testimony; and that there is some evidence to sustain the finding upon which the order is based. Further we cannot go, for the power and discretion of the Appellate Division in the infliction of

> punishment when guilt is established are not subject to review in this court. 199 NY at 144-145.

The Court of Appeals has noted "that 'it is difficult, if not impossible, to enumerate and define with legal precision, every offense for which an attorney... ought to be removed'... [b]road standards governing professional conduct are permissible and indeed often necessary." To find broad standards "impermissibly vague" would make it futile to promote such general guidelines. "Rather than an absolute prohibition on broad standards, the guiding principle must be whether a reasonable attorney familiar with the Code... would have notice of what conduct is proscribed." *Matter of Holtzman,* 78 NY2d 184, 190-191; *Matter of Cooperman,* 83 NY2d 465, 475 (1994).

Petitioner's reliance upon *Matter of Altomerianos,* 106 AD2d 96 (1st Dept. 1990), to suggest that the Appellate Division, Third Judicial Department's imposition of a censure was inappropriate is misplaced. In Altomerianos, the court drew a distinction between intentional and unintentional conversions, where the court found that an attorney unintentionally converted client funds, noting that charges of violating Disciplinary Rule 1-102(A)(4) should be reserved to instances where there is fraudulent conduct and such a violation "generally warrants disbarment." *Id.* at 102. The Appellate Division, First Judicial Department's holding does not require disbarment for all New York Disciplinary Rule 1-102(A)(4) violations, nor is it binding authority upon the Appellate Division, Third Judicial Department.

## II.

**The underlying proceedings were appropriate as there was no basis to assert that the Supreme Court justice who filed the complaint did so as a retaliatory act.**

Petitioner failed to set forth supporting facts or law to sustain his empty allegation that Supreme Court Justice Fischer filed his inquiry against him in retaliation for petitioner filing a request that Justice Fischer recuse himself from various matters where petitioner represented a party before him.

## Conclusion

For the reasons set forth above, the Petition should be denied.

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